**Flourishing Under Private Law? A Critique of McBride’s Explanatory Theory**

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**Abstract:** In *The Humanity of Private Law Part 1: The Explanation*, Nicholas McBride builds upon the work of the ‘new natural law theorists’ to develop an explanatory account of private law. His central argument is that private law is concerned with the flourishing of its subjects while maintaining its legitimacy. In this article, I argue that, once fleshed out, McBride’s central thesis is unpersuasive and that significant areas of private law doctrine do not match his explanations.

1. **Introduction**

What is the best explanation of private law? For many of us familiar, never mind exasperated, with the state of the current theoretical debates, any answer that is not some variation on, or combination of, ‘corrective justice’, ‘rights’ or, most questionably, ‘the legal philosophy of Immanuel Kant’ comes as a blessed relief. In this respect, Nicholas McBride is off to an auspicious start with his impressive new monograph, *The Humanity of Private Law Part 1: The Explanation*, which sets out ‘a way of thinking about private law’.[[1]](#footnote-1) Put simply, he argues that private law is concerned with promoting the flourishing of its subjects while preserving its legitimacy.[[2]](#footnote-2) At first sight, this might seem unobjectionable. Who could deny that flourishing is A Good Thing? And we should be slow to accuse judges and other lawmakers of deliberately crafting the opposite: a private law that diminishes people’s flourishing and is unconcerned with maintaining its legitimacy. But first impressions can be deceiving. In what follows I give an overview of *HPL* before arguing that this theory is unpersuasive as an explanatory account of private law doctrine.

1. **The Theory**

Recent years have seen a backlash in the academic literature to the idea that a single explanatory theory can account for the whole of tort law. The parade of charges levelled against universal tort theories include: they cannot justify divergences in the common law;[[3]](#footnote-3) struggle to explain tort statutes;[[4]](#footnote-4) give a partial account of the law and suffer from problems of fit with important areas of tort doctrine;[[5]](#footnote-5) wrongly maintain that tort law is in ‘in the process of becoming steadily more coherent’;[[6]](#footnote-6) fail to account for the fuzzy boundaries of tort law and ‘hybrid torts’;[[7]](#footnote-7) further a right-wing political ideology;[[8]](#footnote-8) and are normatively unappealing.[[9]](#footnote-9) And the above critiques relate only to one aspect of private law. Given this, the idea that a single theory can encompass such diverse legal topics as the validity of a marriage, whether body parts can be owned and insurance contracts will be greeted by many with scepticism.[[10]](#footnote-10)

McBride finds previous attempts to find a single explanatory theory of private law to be defective. He skilfully disposes of explanatory ‘law and economics’ theories (private law is concerned with wealth maximisation),[[11]](#footnote-11) Kantian accounts (private law is concerned with protecting our independence)[[12]](#footnote-12) and a group of theories known as legal moralism (private law is applied morality).[[13]](#footnote-13) Each one ‘fails to provide us with a satisfying explanation of private law – either because of lack of fit, or lack of plausibility.’[[14]](#footnote-14) Moreover, he demonstrates that economic and Kantian theories are unpersuasive because neither wealth nor independence are intrinsically valuable.[[15]](#footnote-15)

Instead, McBride proposes a ‘humane’ view of private law, called ‘F’. According to F ‘the rules and doctrines of English private law are concerned to promote its subjects’ flourishing as human beings.’[[16]](#footnote-16) Private law does this by ‘(a) *protecting* them from suffering setbacks to their flourishing, and (b) *empowering* people to enter into transactions that will help them to flourish as human beings’[[17]](#footnote-17) but is constrained by the need to maintain the law’s legitimacy.[[18]](#footnote-18)

McBride refers to the vision of flourishing adopted by English private law as the ‘RP’.[[19]](#footnote-19) RP stands for both ‘reflective picture’ (‘the picture of human flourishing that most people living in modern Western liberal societies would endorse if they reflected for a while on what human flourishing involve’) and ‘received picture’ (‘the picture of human flourishing that the culture of modern Western liberal societies encourages us to adopt when we consider what human flourishing involves’).[[20]](#footnote-20)

A flourishing life is one that is ‘going well’.[[21]](#footnote-21) Someone cannot be flourishing if their life is going badly but there is no requirement that their life be unimprovable.[[22]](#footnote-22) McBride’s starting point for the RP is *Natural Law and Natural Rights* by John Finnis.[[23]](#footnote-23) For Finnis, the basic goods required for a flourishing life are: knowledge, skilful performance in work and play, bodily life and the components of its fullness, friendship, marriage, practical reasonableness and ‘harmony with the widest reaches and most ultimate source of all reality including meaning and value’ (sometimes referred to as ‘religion’).[[24]](#footnote-24)

Mercifully, Finnis’s views have not been adopted wholesale. Additions and modifications have been made to his framework. Out goes Finnis’s homophobia and injunctions against contraception;[[25]](#footnote-25) in comes having a ‘desire of the heart’, ‘living in a caring society that seeks to promote the flourishing of everyone in that society’ and being free from anxiety about one’s flourishing being impaired.[[26]](#footnote-26) Enjoyment of the goods should not be dependent on anyone else’s suffering.[[27]](#footnote-27)

One does not need to participate in *all* of the basic goods but someone’s flourishing will be impaired ‘if they do not *acknowledge* that all of the basic goods *are* goods, and are *not open* to acting on the reasons for choosing and acting that they supply.’[[28]](#footnote-28) The basic goods are all equally basic. No objective priority of value exists among them and they are incommensurable.[[29]](#footnote-29) There is no single correct way to flourish: a flourishing life involves being open to participating in the various goods ‘in proportions and intensities to be determined by the individual leading that life’.[[30]](#footnote-30) However, anyone with ‘even the barest awareness of the state of the culture in Western liberal societies would readily agree that the RP is the account of human flourishing that we are encouraged to adopt and endorse as a result of living in such societies’.[[31]](#footnote-31) Additionally, the RP is ‘the vision of human flourishing that the courts have in mind in shaping those elements of private law that are concerned with promoting human flourishing’.[[32]](#footnote-32)

In order to enjoy the primary goods, there are a number of secondary goods that ‘it is very likely that someone will also have to enjoy on a stable basis’.[[33]](#footnote-33) These goods include:

(a) a home; (b) private property; (c) a reasonable level of income; (d) an occupation affording opportunities for skilful mastery and creativity; (e) a decent environment (physical, cultural and political); (f) the ability to mix with other people without shame and without being misled at to the character of those other people; (g) the space and freedom to decide for yourself how you will lead your life; (h) freedom from anxiety over whether you will be deprived in the future of any of goods (a)-(g).[[34]](#footnote-34)

Unlike the primary goods, these goods are only instrumentally valuable.[[35]](#footnote-35) Finally, there are a number of tertiary goods, such as money and contract law, that enable people to enjoy the secondary goods.[[36]](#footnote-36)

McBride then divides private law into our basic obligations, transactions and doctrines concerned with preserving its legitimacy. He uses the terminology ‘basic obligations’ for the law of torts. Basic obligations involve a duty that D owes C which C has not paid for or done anything special for in order for D to come under that duty.[[37]](#footnote-37)

From this, he derives what he calls the ‘Basic Obligation Claim’. This states: ‘(1) in determining what basic obligations we owe each other, private law is concerned to promote the flourishing of its subjects; and (2) the particular conception of human flourishing that it has in mind in doing this is that supplied by the RP’.[[38]](#footnote-38) English private law will not impose a basic obligation on D to see that an event does not occur unless that event will adversely affect one of C’s primary, secondary or tertiary goods. Whether it imposes an obligation will depend on a balancing process that weighs ‘the costs of recognising a particular basic obligation against the benefits’.[[39]](#footnote-39)

McBride defines a transaction as involving ‘the performance of a legal act that is designed to confer some right or advantage either on the person performing the act or on another’ with a legal act being ‘an act that could not be performed without the law’s enabling someone to perform that act’.[[40]](#footnote-40) His ‘Transaction Claim’ is that private law enables us to enter into these different types of transaction in order to allow us to enhance our RP-flourishing’.[[41]](#footnote-41)

In carrying out these functions, private law must ensure it does not endanger its own legitimacy – the belief by the law’s subjects that they should obey the law – otherwise it will be impossible for it to pursue these goals.[[42]](#footnote-42) According to McBride, this legitimacy-preserving function explains many aspects of the law that initially appear inconsistent with a concern for promoting flourishing, such as the objective standard of care in negligence. Basic obligations that take the form of duties to succeed, or that are difficult to achieve, might be thought incompatible with the idea that private law is concerned with the promotion of people’s flourishing but they are sometimes vital to maintain the law’s legitimacy.[[43]](#footnote-43) Yet a tailored standard of care would ‘discriminate unacceptably in favour of inexperienced drivers and against experienced drivers’.[[44]](#footnote-44) Inexperienced drivers ‘would get the benefit of nearby experienced drivers’ driving with a great deal of care and skill, while not having to drive with anywhere near the same care and skill themselves’.[[45]](#footnote-45) An objective standard of care maintains legitimacy by ensuring the law is not ‘unacceptably balanced against the interests of the strong and clever in favour of the interests of the weak and stupid’.[[46]](#footnote-46) In my view, this point about legitimacy is one of the most perceptive observations in *HPL* and one which, if incorporated into rival theories, would improve their ability to fit the case law.[[47]](#footnote-47)

1. **The Critique**

Let us now consider how F stands up as an explanation of private law. In this section I will detail a number of significant flaws with the theory itself before demonstrating that many of McBride’s explanations are hard to square with private law doctrine.

1. **Incommensurable…when it suits**

A major flaw with McBride’s theory is that it struggles to account for conflicts between the basic goods. Take *Miller v Jackson*,[[48]](#footnote-48) where the Court of Appeal was divided on whether an injunction should be granted when balls from a cricket club were hit onto the property of the claimants. According to McBride, Lord Denning saw this case as a conflict between a primary good (skill in play for the cricket club) and a secondary good (enjoyment of home for the claimants) and, as the former is more important it should be prioritised and the injunction denied. So far, so good. By way of contrast, the other judges (Geoffrey Lane and Cumming-Bruce LJJ) saw the case as a conflict between primary goods: D’s mastery of a trade and game and C’s enjoyment of life and health.[[49]](#footnote-49)

McBride’s method of resolving conflicts between primary goods highlights a significant inconsistency with his theory. Consider his discussion of *Miller*:

On this view of the case, and assuming [the Basic Obligations Claim] is correct, one would have expected these two judges to find *Miller v Jackson* a very difficult case – how do you choose between different people’s enjoyment of the primary goods if you are concerned to promote *everyone’s* RP-flourishing? The answer is that you don’t: you attempt to find a compromise that will promote everyone’s interests.[[50]](#footnote-50)

Indeed, McBride states the Basic Obligation Claim will only impose ‘a basic obligation X’ when ‘[i]mposing X on me will not do more harm than good, in that imposing X on me will not do more harm to my own RP-flourishing than the good that would be done by imposing X on me in terms of protecting you from suffering a setback to your own RP-flourishing’.[[51]](#footnote-51) It depends upon on a ‘balancing process’[[52]](#footnote-52) that weighs ‘the costs of recognising a particular basic obligation against the benefits’.[[53]](#footnote-53)

But how is one supposed to weigh the costs and benefits if the basic goods are incommensurable and have no priority of value? If the basic goods are incommensurable then this is not possible. One would not be able to say that better friendships are worth the trade-off of a shorter life or whether one should sacrifice a desire of the heart in exchange for a life partner.[[54]](#footnote-54) The theory does not help us balance competing basic goods against one another in the cases where they clash.

McBride believes this will not be an issue in most cases. If we are to take his word for it, the majority of private nuisance cases ‘do not present the conflict of primary goods that…*Miller v Jackson* presented. Most such cases involve a conflict between the secondary good of being able to enjoy one’s home undisturbed, and the tertiary good of being able to make money.’[[55]](#footnote-55) This is an optimistic view to say the least.[[56]](#footnote-56) And it is not hard to dispute it. If someone is disturbing one’s enjoyment of one’s home then many primary goods will be affected. The factory pumping toxic fumes will be affecting its neighbours’ health, and possibly their friendships (people may not want to visit) as well as other goods. Similarly, many polluters are likely to be carrying out a trade involving some degree of skill. As such, this shortcoming in McBride’s framework is therefore likely to be of practical significance in many nuisance cases.

1. **The secondary and tertiary goods**

It is not only clashes between the basic goods that render the RP questionable. Recall McBride’s catalogue of secondary and tertiary goods. Unless I am mistaken, there appears to be repetition with some of the goods. Take, for example, ‘a reasonable level of income’. It could be reframed as ‘money’, which is a tertiary good.[[57]](#footnote-57) This does not bode well. If certain goods appear in more than one place on the hierarchy then the goalposts can be shifted: they can be classed as secondary goods for some purposes and tertiary goods for others, when it suits.

For example, in *D&F Estates Ltd v Church Commissioners*,[[58]](#footnote-58) a case on recovery of pure economic loss in negligence, the House of Lords rejected a claim by the owners of a block of flats that the sub-contractors involved in plastering the flats owed them a duty of care when they suffered purely economic loss as a result of the defective work. McBride pronounces the result of this case to be ‘plainly correct’ but that it is a tough case due to its reasoning.[[59]](#footnote-59) According to McBridethe claimant lost because D’s duty of care was imposed ‘to protect [C’s] health and safety, not [C’s] bank account.’[[60]](#footnote-60)

Contrast this approach with *Smith v Eric S Bush*.[[61]](#footnote-61) It was held that a valuer instructed by a prospective mortgagee to carry out a valuation of a house owed a duty of care to the prospective mortgagor if the valuer was aware that the mortgagor would probably purchase the house in reliance on the valuation without an independent survey.

Normally these two cases are distinguished on the basis that there was an assumption of responsibility in the latter but not in the former.[[62]](#footnote-62) Whatever one thinks of such an explanation, it is not the tack that McBride chooses to pursue. Instead, we are told that in *Smith* ‘*Purchaser* does not just stand to lose some money. *Purchaser* stands to suffer a particularly devastating form of pure economic loss that will threaten his ability to enjoy the secondary goods of enjoying a home and a reasonable level of income.’[[63]](#footnote-63) In other words, in *D&F* only the tertiary good of money was in play so the claimant lost but in *Smith* the form of economic loss threatened secondary goods. But is this not also true of *D&F*? Income would have been expended getting the walls plastered in *D&F* and it would have affected the enjoyment of the claimants’ home. If the secondary goods of ‘property’ and ‘reasonable level of income’ were present in *Smith*, they were also in play in *D&F*. In both cases, the claimants had suffered pure economic loss due to acquiring defective property and sued parties who had not actually damaged the property. By repeating certain goods in his hierarchy, McBride is able to selectively slide between the different levels – here the tertiary (‘money’) and secondary (‘reasonable level of income’) goods – as and when it suits him. The hierarchy of goods does not provide a satisfactory explanation of the different outcomes in these two cases.

1. **Unfalsifiability**

As mentioned earlier, McBride critiques Kantian and economic theories of private law. Of these theories, McBride states that their ‘obscure and abstract nature’ provide their proponents with opportunities to say that they perfectly fit private law but this also ‘makes that claim *unfalsifiable* – one that could imagine them finding some way to argue that private law still fits [law and economics or Kantian theories] even if it said the complete opposite of what it currently says.’[[64]](#footnote-64) This same accusation can be levelled against McBride’s theory. Once we distinguish F from the work of the ‘new natural law’ theorists, who are not shy about making rigid prescriptive claims, then it becomes overly abstract and flexible.

Consider again *D&F Estates*. Discussed in the previous section, this case forms a key plank of McBride’s argument and features in both the introduction and conclusion of *HPL* as an example of a troublesome case that, unlike rival accounts of private law, F can explain. McBride believes that the result in this case – that the defendant owed the claimant no duty of care – can be explained by F on the basis that the harm that has been suffered by the claimant (pure economic loss) was not the type of harm that D was under a duty to prevent.[[65]](#footnote-65)

But this is question-begging and his theory could result in the opposite conclusion. One could argue that the primary good of a home is endangered by the defendant’s carelessness in *D&F Estates*. It is not obvious that a concern with flourishing means the defendant should win in this type of case and a different outcome could be justified using F. Indeed, the case has not been followed in most other common law countries and it is possible that these judges were just as concerned with flourishing and legitimacy as English judges.[[66]](#footnote-66)

There are further examples where F can give opposing answers to the same questions. Take the, now abolished, torts of enticement and seduction.[[67]](#footnote-67) McBride states:

until 1970, in the case where B was A’s wife, C would owe A a duty not to commit adultery with B, and a duty not to induce B to leave A… the existence of such a duty should not surprise us; but neither should its abolition. Obviously, such a duty has the potential to cause much more harm to B’s (and C’s) RP-flourishing than any good it might do by way of reassuring A about the security of his marriage to B.[[68]](#footnote-68)

So these torts both promoted the good of marriage (or life having a life partner) and harmed that same good.

Additionally, consider McBride’s view of the general economic torts:

…people’s interests in pursuing the tertiary good of having and making money do count for *something* to a private law that is committed to promoting the RP-flourishing of its subjects, and that something is enough to justify people coming under an obligation not *intentionally* to cause someone to suffer pure economic loss by (i) doing something that is independently unlawful, or (ii) combining together with other people to cause that someone that loss.[[69]](#footnote-69)

This ensures that ‘the existence of this obligation has no adverse effect on healthy competition in the marketplace or people’s abilities to go about their lives free from the fear that what they do might end up in their being sued for doing something legally wrong.’[[70]](#footnote-70)

Let us take the situation where A and B combine and use lawful means to cause economic loss to C.[[71]](#footnote-71) This will constitute the tort of lawful means conspiracy if A and B’s predominant purpose is to injure the C, even if they ‘do nothing which would have been actionable if done by an individual acting alone’.[[72]](#footnote-72) Yet if this is not A and B’s predominant purpose – say, where their main purpose was to increase their own profits – no tort is committed. This was confirmed in *Mogul Steamship Co Ltd v McGregor, Gow & Co.*[[73]](#footnote-73)and the principle has been affirmed ever since.[[74]](#footnote-74)

Yet in both scenarios, the tertiary good of money (and, for that matter, the secondary good of having a reasonable level of income) is usually in play for all the parties in both types of cases. If, as in the *Mogul Steamship* case, A and B are allowed to combine together to cause C loss then the good of money is promoted for A and B but diminished for C. On the other hand, if A and B are prevented from so combining, as in cases of lawful means conspiracy, then the reverse might be true (unless they are combining solely out of spite). The RP and the Basic Obligations Claim say nothing about ‘predominant purposes’ and could be used to justify the opposite decision in the *Mogul Steamship* case or, alternatively, the removal of the lawful conspiracy tort.

F can therefore give opposing answers to the same question. This should not surprise us. Most human actions will promote and harm at least one of the basic goods and the RP does not provide a metric for balancing them against one another. Fundamentally, this means that F is unfalsifiable and suffers from the same defect that McBride levels at rival theorists.[[75]](#footnote-75)

1. **Fit**

Difficulties for McBride’s theory do not end there. One problem that plagues the work of many private law theorists is that whenever an inconvenient area of law has been at odds with the theory, the theory wins the day.[[76]](#footnote-76) Doctrine can then be dismissed as wrong,[[77]](#footnote-77) anomalous[[78]](#footnote-78) or not part of private law.[[79]](#footnote-79)

Certainly, McBride is not immune from this tendency. In a notable understatement, he concedes that his theory ‘cannot explain everything’.[[80]](#footnote-80) A non-exhaustive list of private law doctrines, which, by its author’s own admission, the theory cannot fully explain includes conversion,[[81]](#footnote-81) non-delegable duties of care,[[82]](#footnote-82) aspects of the law of defamation[[83]](#footnote-83) and vicarious liability,[[84]](#footnote-84) liabilities arising under the Consumer Protection Act 1987[[85]](#footnote-85) and the principle in *Hedley Byrne v Heller*.[[86]](#footnote-86)

If McBride was outlining a normative theory – a theory about what the law *should* look like – in this volume then there would be no problem dismissing these aspects of private law as ‘wrong’ and arguing that the law would be better if these doctrines were expunged or changed. For example, one might agree, as I do, with McBride that *Hedley Byrne* was a wrong-turn in the law – his take-down of the principle is a *tour de force*, even if one does not subscribe to F – but that is a *normative* critique.

McBride’s aim, at least in volume 1, is explanatory rather than normative. Despite believing that F is the best explanation of private law, he suggests that the RP is not the best possible version of human flourishing and will explore a superior version in volume 2.[[87]](#footnote-87) He believes there are three different models of human flourishing:

1. The Possessions Model (‘where someone can be said to be flourishing if they possess certain goods’);
2. The Service Model (‘where someone can be said to be flourishing insofar as they devote their life to advancing or achieving some worthy project or cause’); and
3. The Journey Model (‘where someone can be said to be flourishing insofar as their life is going in the right direction, towards a particular state or goal’).[[88]](#footnote-88)

Of these, McBride believes the Journey Model is preferable and acknowledges that if the Possessions Model is incorrect then the RP is wrong because the RP is based on a Possessions Model of flourishing.[[89]](#footnote-89) In volume 2 he plans to explore what private law based on a Journey Model of human flourishing would look like and will conclude that if ‘it is legitimate for private law to protect and promote human flourishing then private law is need of major reform’.[[90]](#footnote-90) It is therefore open for McBride to say that F is correct as an explanatory theory of private law but that he sees this theory as normatively undesirable. He does not necessarily endorse the RP.

Nonetheless, the inability of an explanatory theory of private law to actually explain large swathes of private law doctrine raises doubts about its persuasiveness, even if one is inclined to share McBride’s disdain for some or all of above mentioned doctrines. As Murphy has stated of universal tort theories:

If a putatively explanatory theory of tort law cannot account for well established, widely recognised and practically significant torts, then that theory may be fairly described as being beset by a significant problem of fit.[[91]](#footnote-91)

Recognising such concerns, McBride states that ‘it is not a good feature of a theory of private law that it is able to explain *every* aspect of private law’.[[92]](#footnote-92) A theory that could explain every aspect of private law ‘would probably have to be so vague and abstract in its key ideas that it would be able to explain English private *whatever it said*, and would therefore explain nothing at all’.[[93]](#footnote-93) Such a theory would be implausible as:

there *must* be pockets of private law that have gone wrong, because of the influence of bad judges, or the weight of history, or bad ideas. It would be incredible if *every* aspect of private law were developed and fine-tuned to fit a particular idea of private law.[[94]](#footnote-94)

It is hard to disagree. A theory of private law need not explain every single case or doctrine. Judges often make mistakes. But there must come a point where an *explanatory* theory’s lack of fit with the case law means that it is unsuccessful.[[95]](#footnote-95)Even if the above lists represents a small number of anomalies (and there is scope for disagreement), there is evidence that the F cannot account for more areas of private law than McBride acknowledges. Let us now take a look at some of his explanations.

1. **Property**

McBride’s discussion of private law’s protection of property poses problems of fit for his theory. Property is one of the secondary goods under the RP. According to McBride, a private law based on F might ‘might well also recognise the existence of absolute obligations not to interfere with other people’s enjoyment of *secondary goods*’.[[96]](#footnote-96) The justification for an absolute obligation not to interfere with secondary goods is because it secures a further secondary good, ‘the *security of knowing* that what they have cannot be taken away from them in the name of the greater good or the public interest’, which is essential for people’s flourishing.[[97]](#footnote-97)

But if the primary goods are more important than the secondary goods we would not expect private property to be protected to the extent that it currently is in private law. It is far easier to establish that one is owed a duty of care in negligence if one suffers property damage than if one suffers psychiatric injury.[[98]](#footnote-98) Being free from a psychiatric disorder is fundamental to many primary goods. If one is suffering from a psychiatric injury then one cannot be said to be in ‘good health’. Many psychiatric injuries will result in one being ‘muddled and confused’ and unable to identify with the way one’s life is going. Relationships might break down. Anxiety about one’s future will often occur. All this might also be true of negligently inflicted ‘mere’ distress or anxiety, for which the tort of negligence provides no protection.[[99]](#footnote-99) Assuming F is correct, we would expect to find it easier for someone to establish that a defendant owes them a duty of care not to cause them to suffer a psychiatric injury than property damage but this the opposite of the current position.[[100]](#footnote-100)

The unpersuasiveness of F as an explanation of the law of property is heightened when we reflect upon McBride’s claim that ‘where the private ownership of a putative object of property (call it, ‘O’) would do nothing to contribute to the RP-flourishing of the owner, then private ownership of O will not be possible and O will not amount to property’.[[101]](#footnote-101)

McBride cites the example of illegal drugs: ‘The possession of a bag of cocaine by a private individual does not to promote the RP-flourishing of that individual, and so a bag of cocaine in the hands of a private individual is incapable of being owned and therefore amounting to property’.[[102]](#footnote-102) No one would claim that someone addicted to cocaine is flourishing. But not all drugs are as bad as each other. Certain illegal drugs, it is sometimes argued, can improve mental health and thus promote several of the primary goods.[[103]](#footnote-103) There is evidence that tobacco is much more harmful than MDMA (ecstasy).[[104]](#footnote-104) If McBride’s property claim is correct then a packet of cigarettes would be incapable of being property or MDMA would be capable of being owned. It is not open for McBride to reply that drugs are bad merely because the law says they are whereas cigarettes are not because the law permits them. This would not explain why the law is as it is (‘X is unlawful because the law says so’ is not a compelling justification). Also, if this were the case, many of his arguments elsewhere would fall away (the principle in *Hedley Byrne* is also part of the law but he does not resile from criticising it).

Perhaps McBride is not referring to the general level but to specific owners of property. If so, his claim is also assailable. I doubt whether McBride would perceive someone spending all day every day playing computer games as flourishing.[[105]](#footnote-105) Yet such an individual could own a copy of *The Sims*. F therefore struggles to explain the law of property.

1. **Contracts**

A similar criticism can be made about McBride’s explanation of contract law. Contract law is ‘solely’ concerned with ‘facilitating RP-flourishing enhancing exchanges’.[[106]](#footnote-106) Exchanges that ‘would be expected *not* to promote, but instead to damage, the RP-flourishing of one or both of the parties to the exchange will receive little to no support from the law of contract.’[[107]](#footnote-107) Consequently, if ‘a particular type of exchange is likely – should it become sufficiently common – to harm people’s general capacities for RP-flourishing, then contract law would refuse to encourage or support the making of that type of exchange.’[[108]](#footnote-108) Such is the theory, at least. Yet, to use the example given above, contracts for the sale of cigarettes are still permitted despite not promoting flourishing at the general level. And contracts for the sale of alcohol to alcoholics are permitted, indicating that this argument is not true in respect to specific contracts.

McBride believes that the fact that agreements to pay for sex, babies and body parts are all legally unenforceable supports his claim. If such things could be bought and sold then society would ‘quickly become divided into a master class and a servant class for sex, babies and body parts’.[[109]](#footnote-109) Those without independent wealth ‘would have little choice but to join the servant class, and those with independent wealth could hardly be expected to resist the temptation to become members of the master class’.[[110]](#footnote-110) McBride maintains that:

While the law of contract cannot prevent such a society coming into existence – for all we know, it may be coming into existence right now – it can disrupt the creation of such a society by refusing legal enforcement to arrangements for the sale and purchase of sex, babies and body organs. And that is precisely what it does.[[111]](#footnote-111)

Readers with a less active imagination may dispute this lurid picture. Leaving to one side the idea that the surrogacy contract is one for a baby rather than a service,[[112]](#footnote-112) the jurisdictions where surrogacy contracts are enforceable, such as California, have not resulted in society being divided into a master and servant class, any more than the UK at present.[[113]](#footnote-113) Similar points can be made with the selling of sex. Is New Zealand where, sex work is fully decriminalised, such a society?[[114]](#footnote-114) As an explanation of why these contracts are considered, by some, to be objectionable, this reasoning appears distinctly dubious. Whatever one thinks about the potential of such contracts to promote flourishing, the main impetus for the Surrogacy Arrangements Act 1985 was the ‘moral panic’ of the Baby Cotton affair and a concern for the welfare of children born as a result of such arrangements.[[115]](#footnote-115)

In any event, even if McBride *is* correct about surrogacy and sex, his argument proves too much. The view that contract law would try to prevent a master and servant class is hard to take seriously when one considers that the law literally allows contracts for someone to become a servant. Why would contract law be opposed to a master and servant class for sex, body parts and babies but have no qualms about such a class developing for other goods and services? If private law wanted to prevent a master-servant society then drastic reform of many employment contracts would be a better place to start.

1. **Whose flourishing?**

This brings us to another weakness with McBride’s explanation. It is not clear whether F is concerned with the flourishing of the individual parties to a case or society at large. With companies, he outlines their benefits thus:

The natural advantages that companies possess in performing the function of creating and supplying goods and services is a large part of the reason why modern Western liberal societies have experienced a “great enrichment” over the last 200 years or so, becoming far wealthier – by orders of thousands of per cent – than their predecessors. Without companies, it would simply not be possible for as many people to RP-flourish as they do today.[[116]](#footnote-116)

Aspects of this statement can be contested but what is of interest here is that McBride does not rely upon these supposed benefits to society brought by companies. His Transaction Claim states that ‘you are empowered to create a company not because your doing so will enhance *other people’s* RP-flourishing, but because it will enhance your own’.[[117]](#footnote-117) In other words, F is not concerned with the flourishing of society as a whole but with the flourishing of individuals who set up companies. Apparently, companies promote the goods of ‘friendship, creativity, satisfying a “desire of the heart” to see some meaningful project or cause promoted or pursued, and identifying with how one’s life is going’.[[118]](#footnote-118)

There are several problems with this analysis. Setting up a company might be good for the flourishing of the shareholders but bad for the rest of us. Perhaps the East India Company, British American Tobacco and Monsanto promote or promoted ‘creativity’ but we might hesitate before describing them as unalloyed goods for society. A similar point can be made about the law of property: it might promote the flourishing of property-owners but the homeless might not take such a rose-tinted view. It is hard to describe such a system as concerned with the promotion of flourishing *tout court*. Even if it was, allowing companies to diminish the flourishing of some people in order to promote flourishing generally would arguably be inconsistent with McBride’s belief that in order to flourish, ‘Enjoyment of [the basic] goods…is not dependent on *anyone else’s* suffering’.[[119]](#footnote-119)

This issue is one of externalities: where the costs or benefits of a particular activity are borne by third parties. Analysis of externalities is one of the great insights of law and economics.[[120]](#footnote-120) While McBride’s criticisms of this school of thought – outlined above – have force, his theory would have been strengthened by greater engagement with this problem.

Putting this concern to one side, it highlights an inconsistency in McBride’s argument. Let us return to McBride’s reason why private law does not permit contracts for the sale of sex or babies. There, he argued that contracts for surrogacy and sex should not be permitted because allowing them could lead to a master-servant society. Yet he did not claim that a contract for surrogacy would not improve the flourishing of the individuals involved. In fact, such an outcome is perfectly possible. For example, the surrogate is making money and helping an infertile couple; the infertile couple get the child they want. Both parties flourish and achieve several goods (desire of the heart, improved relationship with one’s partner, ability to buy a home, money, friendships etc.).[[121]](#footnote-121) But McBride was concerned about the effect on society. Of course, with surrogacy there is a third party involved: the child. Yet all available evidence indicates that the parent-child relationship is unaffected by surrogacy.[[122]](#footnote-122) Besides, why would private law be concerned with this (alleged) negative externality but not those generated by company and property law?

Analogies could be made here with the perennial debate about whether private law is concerned with corrective justice or distributive justice but I will spare readers a summary of literature with which they are no doubt familiar.[[123]](#footnote-123) For present purposes, it is crucial to note that if the effect on society is what matters then we might question the benefits that companies bring and thus whether F can explain this part of the law. If the effects on the individuals involved in a transaction are paramount then we might question the unenforceability of contracts for sex and surrogacy. If both are important then we will need a theory outlining which should be the focus in particular cases. McBride’s explanation is therefore inconsistent and indicates that the gap between theory and doctrine is greater than his portrayal.

1. **Conclusion**

I have argued above that McBride’s central thesis – that private law is concerned with the promotion of flourishing while preserving its legitimacy – may appear intuitively attractive at the general level but once flesh is put on its bones it becomes uncompelling and fails to match significant areas of private law doctrine. The criticisms that I have raised in this article are by no means irrefutable but they do present substantial challenges for F. Unless they are addressed (and we do have a second book to look forward to, so this is possible), then, despite being packed with insights and constituting an outstanding piece of scholarship, *The Humanity of Private Law* fails in its ambition of explaining private law.

Can the theory be saved? The basic goods might not actually incommensurable (or, at least, they might not be incomparable).[[124]](#footnote-124) People who say that things are incommensurable are fond of remarking that something is like ‘comparing apples and oranges’. But they have *usually* not thought about the issue for long enough. Apples and oranges can be compared by a range of metrics: weight, price, vitamins and minerals (and probably taste: who prefers apples?). As Chang states:

Two items are never comparable, simpliciter; they are always comparable in some respect or respects. Chalk is comparable with cheese in some respects – cheese tastes better. Apples are comparable with oranges in some respects – apples are worse with respect to preventing scurvy…As the negation of claims of comparability, claims of incomparability must have the same logical form. Two items are never incomparable, simpliciter.[[125]](#footnote-125)

One could take a common metric – such as the maximisation of welfare or preferences – to resolve the apparent conflicts between the goods in McBride’s scheme. It is possible that many of the basic goods could serve as useful mid-level principles about the types of things that usually promote flourishing – nobody denies that good health is something worth having – but when two goods conflict, they could be weighed against each other to determine which consequences will satisfy people’s preferences or improve their welfare (depending upon what metric is used). Judges balance a number of alleged ‘incommensurable’ factors (e.g. the need to maintain certainty in law, what will be best for society as a whole or, to use one of McBride’s insights, the need to maintain legitimacy) when deciding private law cases and have different views on the correct balance.[[126]](#footnote-126) In this respect, a utilitarian explanation may be a better account for the fact that aspects of private law can sometimes appear untidy.[[127]](#footnote-127)

Another way in which the theory could be strengthened would be to say that judges have been *aiming* to promote flourishing but have sometimes been mistaken about the best way of doing this. After all, if, as McBride hints, judges have been wrong about the very model of flourishing that should be used, they could have been equally misguided about what promotes flourishing under their chosen model. The areas that he believes cannot be explained by F, such as significant parts of the law of vicarious liability or the principle in *Hedley Byrne*, could then be encompassed by the theory. For example, judges might have decided *Lister v Hesley Hall Ltd*.[[128]](#footnote-128) or *Hedley Byrne* in a way that they *thought* would promote flourishing but have been completely mistaken about the best way of obtaining such an outcome.

Finally, McBride might need to concede that contract, property and company law as they presently exist are not structured in a way that promotes the flourishing of most people (admittedly, this is a political or normative question). Accepting this view does not mean that judges did not have this as an *aim* when developing contract, property and company law: the class and politics of lawmakers mean that they may have confused what will promote flourishing for *people generally* with what will promote flourishing for *people* *like them*.[[129]](#footnote-129) Of course, such a theory would be at the more abstract end of the spectrum but perhaps we need to acknowledge that any model encompassing everything from the law of marriage to the rule in *Rylands v Fletcher* cannot be anything else.

1. \* I am grateful to John Murphy and Dan Priel for helpful comments. All web links last accessed 10 February 2020.

   Nicholas McBride, *The Humanity of Private Law Part 1: The Explanation* (OUP 2019) (hereafter *HPL*) viii. [↑](#footnote-ref-1)
2. ibid 30-31. [↑](#footnote-ref-2)
3. James Goudkamp and John Murphy, ‘Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories’ in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart 2015). [↑](#footnote-ref-3)
4. James Goudkamp and John Murphy, ‘Tort Statutes and Tort Theories’ (2015) 131 LQR 133. [↑](#footnote-ref-4)
5. See James Goudkamp and John Murphy, ‘The Failure of Universal Theories of Tort Law’ (2015) 21 LT 47 (in particular, they argue that universal tort theories cannot account for: recovery of pure economic loss in negligence, breach of duty, the rule in *Rylands v Fletcher*, the defence of illegality and the availability of punitive damages), Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471 (corrective justice cannot explain much of private law, particularly strict liability), Christian Witting ‘The House That Dr Beever Built: Corrective Justice, Principle and the Law of Negligence’ (2008) 71 MLR 621 (corrective justice cannot explain the law of negligence), Dan Priel, ‘Land Use Priorities and the Law of Nuisance’ (2015) 39 Melb U L Rev 346 (corrective justice cannot explain the law of private nuisance). [↑](#footnote-ref-5)
6. John Murphy, ‘Contemporary Tort Theory and Tort Law’s Evolution’ (2019) CJLJ 413, 415. [↑](#footnote-ref-6)
7. John Murphy, ‘Hybrid Torts and Contemporary Tort Theory’ (2019) McGill LJ (forthcoming). [↑](#footnote-ref-7)
8. Dan Priel, ‘Torts, Rights and Right-Wing Ideology’ (2011) 19 Torts LJ 1. [↑](#footnote-ref-8)
9. Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007). [↑](#footnote-ref-9)
10. See Steve Hedley, ‘Is Private Law Meaningless?’ (2011) 64 CLP 89, 90 and Steve Hedley, ‘The Rise and Fall of Private Law Theory’ (2018) 134 LQR 214 [↑](#footnote-ref-10)
11. See Richard Posner, ‘A Theory of Negligence’ (1972) 1 J Leg Stud 29. [↑](#footnote-ref-11)
12. See Ernest Weinrib, *The Idea of Private Law* (OUP 2012), Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007) and Allan Beever, *A Theory of Tort Liability* (Hart 2016). [↑](#footnote-ref-12)
13. The latter includes John Goldberg and Benjamin Zipusrky’s civil recourse theory (tort law is concerned with providing victims with an avenue of civil recourse against those who have wrongfully injured them) and John Gardner’s continuity thesis (if D breaches a moral duty to C to do X then they will owe C a new duty to undo the harmful consequences that results from the breach of that duty) See John Goldberg and Benjamin Zipursky, ‘Torts as Wrongs’ (2010) 88 Texas LR 917 and John Gardner, ‘What is Tort Law For? Part 1: The Place of Corrective Justice (2011) L & Phil 1. [↑](#footnote-ref-13)
14. *HPL* 28. [↑](#footnote-ref-14)
15. ibid 10-11 and 13-14. He also criticises legal moralist theories as they perpetuate the idea that morality is a code rather than a map. Although I need not engage with this debate for the purposes of this article, I found this argument unconvincing as I doubt that this critique is open to work based on the new natural law. [↑](#footnote-ref-15)
16. ibid 30. [↑](#footnote-ref-16)
17. ibid 70. [↑](#footnote-ref-17)
18. ibid 30-31. [↑](#footnote-ref-18)
19. ibid 82. [↑](#footnote-ref-19)
20. ibid. [↑](#footnote-ref-20)
21. ibid. [↑](#footnote-ref-21)
22. ibid 83 [↑](#footnote-ref-22)
23. (2nd end, OUP 2011). [↑](#footnote-ref-23)
24. ibid 420. [↑](#footnote-ref-24)
25. See John Finnis, ‘Law, Morality and “Sexual Orientation”’ (1994) 69 Notre Dame L Rev 1049 and *Moral Absolutes: Tradition, Revision and Truth* (Catholic University of America Press, 1991)ch iv. For criticisms see Nicholas Bamforth and David Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (CUP 2011) 277. [↑](#footnote-ref-25)
26. *HPL* 107. [↑](#footnote-ref-26)
27. ibid. [↑](#footnote-ref-27)
28. ibid 85. [↑](#footnote-ref-28)
29. ibid. [↑](#footnote-ref-29)
30. ibid 86. [↑](#footnote-ref-30)
31. ibid 108. This is open to question. Similar claims could arguably be made by some of the rival theories that McBride is quick to dismiss, such as the capabilities approach developed by Sen and Nussbaum. See Amartya Sen, *The Idea of Justice* (Penguin, 2010) pt III and Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (HUP, 2011). [↑](#footnote-ref-31)
32. ibid 114. [↑](#footnote-ref-32)
33. ibid 124. [↑](#footnote-ref-33)
34. ibid. McBride includes a table on page 107 of *The Humanity of Private Law* where the secondary goods are referred to as ‘external goods’ and included with the catalogue basic goods. The tertiary goods are not included in this table. [↑](#footnote-ref-34)
35. ibid. [↑](#footnote-ref-35)
36. ibid. [↑](#footnote-ref-36)
37. ibid 115. [↑](#footnote-ref-37)
38. ibid 123. [↑](#footnote-ref-38)
39. ibid 127. [↑](#footnote-ref-39)
40. ibid 154. [↑](#footnote-ref-40)
41. ibid. [↑](#footnote-ref-41)
42. ibid 199. [↑](#footnote-ref-42)
43. ibid 203. [↑](#footnote-ref-43)
44. ibid. [↑](#footnote-ref-44)
45. ibid. [↑](#footnote-ref-45)
46. ibid 241. [↑](#footnote-ref-46)
47. Being the subject of Lord Sumption’s recent Reith Lectures, it is also very timely. See Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books, 2019) 24. [↑](#footnote-ref-47)
48. [1977] QB 966. [↑](#footnote-ref-48)
49. *HPL*116. [↑](#footnote-ref-49)
50. ibid129. [↑](#footnote-ref-50)
51. ibid 115-116. [↑](#footnote-ref-51)
52. ibid125. [↑](#footnote-ref-52)
53. ibid 127. [↑](#footnote-ref-53)
54. Ruth Chang, in contrast to McBride’s scheme, would dispute the idea that goods are incomparable because they belong to a certain type. She gives the example that a superficial and banal friendship – albeit, still a friendship – would not necessarily be preferable a million dollars worth of mere market goods (see ‘Against Constitutive Incommensurability or Buying and Selling Friends’ (2001) 11 Philosophical Issues 33, 56). According to McBride’s scheme the friendship would be of more value. [↑](#footnote-ref-54)
55. *HPL* 129. [↑](#footnote-ref-55)
56. For criticisms of the idea that the law of nuisance is concerned with land use priorities see Priel, ‘Land Use Priorities’ (n 5), 365. Priel criticises the theory of nuisance developed by Allan Beever in *The Law of Private Nuisance* (Hart 2013). [↑](#footnote-ref-56)
57. One might even argue that ‘money’ should be a secondary good and a ‘reasonable level of income’ the tertiary good as the latter allows one to obtain the former. It is undeniable that if I earn enough income I can save up part of my salary to obtain a store of money. However, the better view is that these goods are indistinguishable as if I have a large store of money it can also lead to me having a reasonable level of income (e.g. compensatory damages awarded as a lump sum or savings in a pension). Ignoring interest and living costs, £100,000 per year for ten years could allow me to save £1,000,000 (i.e. an income can lead to a store of money) and £1,000,000 as a lump sum could allow me to have £100,000 per year for ten years (money can lead to income). [↑](#footnote-ref-57)
58. [1989] AC 177. [↑](#footnote-ref-58)
59. *HPL* 6. [↑](#footnote-ref-59)
60. ibid 242. [↑](#footnote-ref-60)
61. [1990] 1 AC 831. [↑](#footnote-ref-61)
62. For a critique see Jane Stapleton, ‘Duty of Care and Economic Loss: A Wider Agenda’ (1991) 107 LQR 249, 277-283. [↑](#footnote-ref-62)
63. *HPL* 134. [↑](#footnote-ref-63)
64. *HPL* 28. [↑](#footnote-ref-64)
65. ibid 242. [↑](#footnote-ref-65)
66. See *Bryan v Maloney* [1995] HCA 17 (Australia), *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co* [1995] 1 SCR 85 (Canada), *Invercargill City Council v Hamlin* [1996] AC 624 (New Zealand) and *RSP Architects v MCST Plan No 1075 (Eastern Lagoon*) [1999] 2 SLR (R) 134 (Singapore). [↑](#footnote-ref-66)
67. Law Reform (Miscellaneous Provisions) Act 1970 ss 4-5. These torts are discussed by McBride at *HPL* 184. [↑](#footnote-ref-67)
68. *HPL* 184. [↑](#footnote-ref-68)
69. ibid 131. [↑](#footnote-ref-69)
70. ibid. [↑](#footnote-ref-70)
71. See John Murphy, ‘Malice as an Ingredient of Tort Liability’ (2019) 78 CLJ 355. [↑](#footnote-ref-71)
72. *Lonrho Plc v Fayed* [1992] 1 AC 448, 465 per Lord Bridge. See also *JSC BTA Bank v Khrapunov* [2018] UKSC 19 at [9] per Lord Sumption and Lord Lloyd-Jones. [↑](#footnote-ref-72)
73. [1892] AC 25. [↑](#footnote-ref-73)
74. See *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25, *Lonrho Ltd v Shell Petroleum Co* [1982] AC 173 and *Total Network SL v HMRC* [2008] 1 AC 1174 at [38] per Lord Hope. [↑](#footnote-ref-74)
75. *HPL* 28. [↑](#footnote-ref-75)
76. Jane Stapleton, ‘Taking the Judges Seriously’ (2018) Clarendon Law Lectures. Available at https://www.law.ox.ac.uk/clarendon-law-lecture-series [↑](#footnote-ref-76)
77. See for example, Beever’s views of *White v Jones* [1995] 2 AC 207 in *Rediscovering* (n 12) 268 and Robert Stevens, ‘The Unjust Enrichment Disaster’ (2018) 134 LQR 574 (arguing that several restitution cases were incorrectly decided). [↑](#footnote-ref-77)
78. See the examples given in John Murphy, ‘Malice as an Ingredient of Tort Liability’ (2019) 78 CLJ 355, 356. [↑](#footnote-ref-78)
79. See e.g. Weinrib’s argument in *Idea* (n 12) 151 fn 12 that public authority liability in negligence is ‘closer to the judicial review of administrative actions’. [↑](#footnote-ref-79)
80. *HPL* 242. [↑](#footnote-ref-80)
81. ibid. [↑](#footnote-ref-81)
82. ibid 245. [↑](#footnote-ref-82)
83. ibid 243. [↑](#footnote-ref-83)
84. ibid 248. [↑](#footnote-ref-84)
85. ibid 249 [↑](#footnote-ref-85)
86. ibid 235. [↑](#footnote-ref-86)
87. ibid33. [↑](#footnote-ref-87)
88. ibid. [↑](#footnote-ref-88)
89. ibid34. [↑](#footnote-ref-89)
90. ibid. I have some doubts whether the Journey Model complies with McBride’s own requirements for human flourishing listed on p 33 but will await volume 2 to see whether these are resolved. [↑](#footnote-ref-90)
91. See John Murphy ‘Hybrid Torts’ (n 7) and Peter Cane ‘Anatomy of Private Law Theory: A 25th Anniversary Essay’ (2005) 25 OJLS 203, 207. [↑](#footnote-ref-91)
92. *HPL* 39. [↑](#footnote-ref-92)
93. ibid. [↑](#footnote-ref-93)
94. ibid. [↑](#footnote-ref-94)
95. John Murphy, ‘Rights, Reductionism and Tort Law’ (2008) 28 OJLS 393, 407 [↑](#footnote-ref-95)
96. *HPL* 119. [↑](#footnote-ref-96)
97. ibid. [↑](#footnote-ref-97)
98. See *White v Chief Constable of South Yorkshire* Police [1999] 2 AC 455, 492-493 per Lord Steyn and 501 per Lord Hoffmann. [↑](#footnote-ref-98)
99. *McLoughlin v O’Brian* [1983] 1 AC 410, 431 per Lord Bridge. [↑](#footnote-ref-99)
100. Indeed, it is easier to claim for psychiatric injury as a result of damage to property than it is to claim for psychiatric injury caused by the death of a close friend, despite the latter being a basic good and property being merely a secondary good. Compare *Attia v British Gas* [1988] QB 304 with *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. [↑](#footnote-ref-100)
101. *HPL* 145. [↑](#footnote-ref-101)
102. ibid144-145. [↑](#footnote-ref-102)
103. Alex Therrien, ‘Could psychedelics transform mental health?’ (1 July 2018, BBC News) https://www.bbc.co.uk/news/health-44575139 [↑](#footnote-ref-103)
104. See David Nutt et al, ‘Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse’ (2007) 369 The Lancet 1047. [↑](#footnote-ref-104)
105. *HPL* 30. [↑](#footnote-ref-105)
106. ibid169. [↑](#footnote-ref-106)
107. ibid167. [↑](#footnote-ref-107)
108. ibid 169. [↑](#footnote-ref-108)
109. ibid. [↑](#footnote-ref-109)
110. ibid. [↑](#footnote-ref-110)
111. ibid 170. [↑](#footnote-ref-111)
112. See Craig Purshouse and Kate Bracegirdle ‘The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?’ (2018) 26 Med L Rev 557, 575-578. [↑](#footnote-ref-112)
113. There is greater inequality in the USA than the UK but it is highly doubtful that the reason for such disparities is the enforceability of surrogacy contracts. [↑](#footnote-ref-113)
114. See s 7, Prostitution Reform Act 2003, which states that such contracts are not void or illegal. An argument could also be advanced that, in a capitalist society, permitting kidney sales could promote flourishing. See Janet Radcliffe Richards, *Careless Thought Costs Lives: The Ethics of Transplants* (OUP 2012) 42-101. [↑](#footnote-ref-114)
115. See Michael Freeman, ‘Does Surrogacy Have a Future After Brazier?’ (1999) 7 Med L Rev 1, 2-6. [↑](#footnote-ref-115)
116. *HPL* 178. [↑](#footnote-ref-116)
117. ibid. [↑](#footnote-ref-117)
118. ibid. [↑](#footnote-ref-118)
119. ibid 107 (my emphasis). [↑](#footnote-ref-119)
120. See RH Coase, ‘The Problem of Social Cost’ (1960) 3 JLE 1. [↑](#footnote-ref-120)
121. See Kim Cotton, ‘The UK’s Antiquated Laws on Surrogacy: A Personal and Professional Perspective’ (2016) 4 J Med L & Ethics 229. [↑](#footnote-ref-121)
122. England and Wales Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law – A Joint Consultation Paper* (Consultation Paper 244, 2019) 28-31. [↑](#footnote-ref-122)
123. See the sources at n 12 above for accounts of corrective justice. For accounts of distributive justice see Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (n 9), Peter Cane ‘Distributive Justice and Tort Law’ (2001) NZLR 401, 413 and Dan Priel, ‘Private Law: Commutative or Distributive?’ (2014) 77 MLR 308. [↑](#footnote-ref-123)
124. For a useful discussion of incommensurability see Ruth Chang ‘Introduction’ in *Incommensurability, Incomparability, and Practical Reason* (HUP, 1998). Chang reserves the term ‘incommensurable’ for items that cannot be precisely ‘measured by some common scale of units of value’ and distinguishes this from ‘incomparable’, which refers to items that cannot be compared. Goods being incommensurable is not fatal to utilitarianism (it does not require a precise valuation of different options). [↑](#footnote-ref-124)
125. Ruth Chang, ‘Value Incomparability and Incommensurability’ in Iwao Hirose and Jonas Olson (eds), *The Oxford Handbook of Value Theory* (OUP, 2015) 208. [↑](#footnote-ref-125)
126. John Murphy, ‘Evolution’ (n 6) 415. [↑](#footnote-ref-126)
127. See Craig Purshouse, ‘Utilitarianism as Tort Theory: Countering the Caricature’ (2018) 38 LS 24. [↑](#footnote-ref-127)
128. [2002] 1 AC 215. [↑](#footnote-ref-128)
129. See JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press 1997) 293 and Lord Devlin ‘Judges and Lawmakers’ (1976) 39 MLR 1, 8. [↑](#footnote-ref-129)